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No. 07-1554

In the Supreme Court of the United States

COLUMBIA GAS TRANSMISSION CORP.,
Petitioner,

v.

RICHARD A. LEVIN,
TAX COMMISSIONER OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May a State, consistent with the Commerce Clause, impose tax rates on state-regulated natural gas companies that differ from tax rates on interstate pipeline companies, given the different core market that each serves and the different regulatory structure that applies to each, notwithstanding some incidental competition between the two types of entities?

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INTRODUCTION

This case does not warrant review because it involves the application of settled law to a particular set of facts. The Court has already ruled that States may tax different types of participants in the natural gas industry in different ways without offending the dormant or negative Commerce Clause. *General Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997) ("*Tracy*"). In *Tracy*, the Court explained that entities may demand equal tax treatment only relative to "similarly situated" entities, while differently situated entities may be taxed differently. *Id.* at 298-99. The Court applied that principle to the different types of companies whose sales were at issue in *Tracy*. The Court concluded that the State could offer unique tax treatment to State-regulated public utilities, called "local distribution companies," or LDCs. Those LDCs alone sold the "bundled product" of natural gas as a commodity along with delivery of the gas, and LDCs alone were legally bound to meet certain duties, such as serving as a "provider of last resort," along with selling gas to residences and other consumers. *Id.* at 301, 306. The other sellers at issue, called "independent marketers," were fundamentally different from, and thus not "similarly situated" to, the LDCs, because the independent marketers sold gas on an open market and were not subject to the same regulations or duties as LDCs. *Id.* at 310. Thus, the State could treat the two entities differently.

Petitioner, Columbia Gas Transmission Corp. ("Columbia Transmission" or "Columbia"), asks the Court to revisit *Tracy* because, Columbia says, the regulatory regime and gas market have changed so much that a new result is warranted. Petition

("Pet.") at 4-9, 15. But Columbia overstates the minor changes since *Tracy* and misapprehends *Tracy*'s meaning. As explained below, *Tracy* was based on broad principles that are still true today; it did not turn on the minor points that Columbia insists were critical. Moreover, even if LDCs and independent marketers are, as Columbia says, closer to being similarly situated than they were in *Tracy*, that would not help Columbia. Columbia is not a marketer, but is instead a "pipe-line company" under Ohio's public utility and tax laws. Columbia Transmission, like other interstate pipeline companies, or IPCs, primarily transports natural gas across the nation, from production wells and gathering lines to local "distribution" pipeline systems, at which point the pipeline companies' connection with the natural gas ends. IPCs today are even more dissimilar from LDCs than independent marketers were in *Tracy*. Thus, *Tracy* squarely governs this case and validates the different tax treatment at issue, and nothing about this case warrants further review, let alone a different result on the merits.

In addition, Columbia's half-hearted attempt to show a division of authority falls flat, because the sole case it cites does not conflict in any way with the Ohio Supreme Court decision below. See Pet. at 21 (citing *In re CIG Field Servs. Co.*, 112 P.3d 138 (2005)); see also *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St. 3d 122 (2007), Pet. App. 1a. Nor does Columbia's appeal to policy and congressional intent aid its cause, as Congress has not acted—though it could—in response to *Tracy* or the alleged market changes.

Finally, this case is not a good vehicle to review the threshold issue of "similarly situated" entities, as Columbia's claim surely would fail even if it overcame the hurdles identified above. First, LDCs and IPCs end up paying similar taxes, despite the property tax difference, because LDCs—but not IPCs—pay a separate "MCF tax" based on the volume of gas they sell, and the Court has long recognized that "compensatory taxes" may be considered in weighing whether seeming discrimination is balanced out by other taxes. *Tracy*, 519 U.S. at 309. In fact, Ohio's General Assembly imposed this new MCF tax on LDCs in the same legislation that cut LDCs' personal property tax rate from 88 to 25 percent, and it described this trade-off as a "revenue neutral" measure.

Second, Congress has expressly blessed State discretion over issues such as this, negating any dormant Commerce Clause argument. As the Court noted in *Tracy*—though it was not placed at issue there—Section 1(b) of the Natural Gas Act of 1938 ("NGA"), 15 U.S.C. § 717(b), exempts preferential State tax treatment of LDCs from dormant Commerce Clause challenges. Thus, even were Columbia to overcome its other obstacles, it eventually would hit this wall.

For these and other reasons below, the Court should deny the Petition.

REASONS TO DENY THE WRIT

A. The decision below does not conflict with *GM v. Tracy*, because the relevant legal framework and facts have not changed.

Columbia Transmission's primary argument for review is its insistence that the natural gas market has changed in such drastic ways that the Court should revisit its 1997 decision in *GM v. Tracy*. In particular, Columbia insists that the new competition in the residential market between LDCs and independent marketers so erodes the basis of *Tracy* that it can no longer be said that *interstate pipeline companies* such as Columbia are not similarly situated to LDCs. Columbia also urges that the slight potential or actual competition between IPCs and LDCs makes them similarly situated.

As detailed below, Columbia is wrong. First, the Court based *Tracy* on several factors that remain valid today, despite the competition between LDCs and marketers in the residential market. *Tracy* did not turn solely on the then-monopoly that LDCs had in the residential market. Second, LDCs and IPCs are not similarly situated. LDCs remain fundamentally different from all other entities, whether IPCs or marketers, as only LDCs sell the bundled product of gas and gas delivery, and only LDCs must satisfy the many duties that Ohio's public utility regulations impose on them. Moreover, IPCs cannot enter the LDCs' core market, even if marketers may, and in light of that major difference, any marginal competition between LDCs and IPCs is irrelevant.

1. *Tracy* did not turn solely on the LDCs' then-monopoly over natural gas sales to residences, but instead was based on several factors that remain true, such as the LDCs' unique duties to consumers and institutional concerns about judicial intervention.

Columbia Transmission's argument rests entirely on a misreading of *Tracy*, and correcting that misreading leaves little to nothing left of its argument for revisiting *Tracy*. Columbia says that *Tracy*'s "determination that LDCs were not 'similarly situated' to independent gas marketers was driven *exclusively by the fact that LDCs served as monopoly suppliers* to a captive residential market, a fact that is no longer true." Pet. at 15 (emphasis added). But Columbia is wrong: *Tracy* rested on several factors, including LDCs' unique role in serving residential consumers, and the monopoly status was just one component. More important was that LDCs had State-imposed legal duties toward those consumers, and equally important was the Court's concern about the judiciary's inability, and Congress's superior ability, to assess the economic policies and predictions involved in these issues.

The *Tracy* Court began its analysis by explaining that "any notion of discrimination assumes a comparison of substantially similar entities," *Tracy*, 519 U.S. at 298, and thus "when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes." *Id.* at 299. The Court acknowledged that the LDCs and independent

marketers might compete in the commercial and industrial markets, *id.* at 302, and it further noted that "[e]liminating the sales tax differential at issue" could "intensify competition between LDCs and marketers for customers in [the industrial] noncaptive market." *Id.* at 303. But on the other hand, the Court noted that the LDCs and marketers did not compete in the LDCs' core market of serving residential consumers. Thus, the Court had to decide whether to "accord controlling significance to the noncaptive market in which they compete, or to the noncompetitive, captive market in which the local utilities alone operate." *Id.*

In concluding that the residential market was the relevant one, the Court noted several factors. It did, as Columbia stresses, note the captive nature of the LDC market. But the Court also noted, along with the LDCs' monopoly status, that State regulation imposed many duties on LDCs. The Court explained that "State regulation of natural gas sales to consumers serves important interests in health and safety in fairly obvious ways, in that requirements of dependable supply and extended credit assure that individual buyers of gas for domestic purposes are not frozen out of their houses in the cold months." *Id.* at 306. As explained below, LDCs alone retain these duties under Ohio law today. The important point here, regarding *Tracy's* meaning, is that the Court relied not merely on the LDCs' monopoly status per se, but on the duties that accompanied that status, as those duties serve State interests.

The Court summarized this concern as "an obligation to proceed cautiously lest we imperil the

delivery by regulated LDCs of bundled gas to the noncompetitive captive market." *Id.* at 304. This statement, to be sure, includes the word "captive," but the broader concern reflected here is the need to preserve LDCs' provision of gas to residences. Today's "changed" world still relies solely on the LDCs as the entities *guaranteed* to meet that need, so the fact that interstate marketers also might meet that need—but are not required to—cannot be said to undermine the entire basis for *Tracy*.

Equally important, the Court in *Tracy* stressed the relative institutional weakness of courts, as opposed to Congress, in assessing the effects of altering State regulation or taxation of the natural gas market. The Court explained that "as a Court we lack the expertness and the institutional resources necessary to predict the effects of judicial intervention invalidating Ohio's tax scheme on the utilities' capacity to serve this captive market." *Id.* By contrast, explained the Court, Congress is better suited to the task, because it "has both the resources and the power to strike the balance between the needs of the competitive and captive markets." *Id.*

The Court's latter concern—namely, that Congress can assess this issue better than the Court can—is of course not affected by the presence of competition between LDCs and independent marketers. As the market evolves, Congress remains able to step in and use its Commerce Clause powers to make whatever changes it thinks necessary. Congress has not acted. Indeed, while Columbia Transmission makes much of its view of congressional intent, see Pet. at 23-29, it does not explain why Congress cannot fix the alleged problem

here. (In addition, as detailed below, Congress has maintained an express exemption from Commerce Clause challenge of differential treatment such as the tax rates at issue here.)

Thus, *Tracy* turned on more than the LDCs' monopoly status, and the other key factors—as well as the delivery part of the monopoly—remain unchanged.

2. Interstate pipeline companies, such as Columbia Transmission, are not similarly situated to LDCs.

IPCs, such as Columbia Transmission, differ from LDCs in at least two dispositive ways. First, only the LDCs are legally obligated to meet several public utility obligations, so LDCs remain unique entities even though independent marketers compete with LDCs in the residential market. Second, legal restrictions and practice limitations prevent IPCs from entering the LDCs' core residential market. Because IPCs are categorically excluded from competing with LDCs in the relevant market, any marginal competition in other markets is irrelevant.

a. Ohio's LDCs retain unique duties toward residential consumers, reflecting the State's interest in citizens' welfare.

LDCs have distinct duties that keep them from being similarly situated to any other entities in the natural gas market, whether independent marketers or IPCs. Columbia Transmission reluctantly acknowledges this truth but seeks to minimize it, conceding only that "the LDCs still retain some vestigial obligations from their time as a monopoly

supplier, such as an obligation to serve as a provider of last resort." Pet. at 7. But what Columbia dismisses as "vestigial obligations" are a comprehensive web of duties ensuring that "individual buyers of gas for domestic purposes are not frozen out of their houses in the cold months." *Tracy*, 519 U.S. at 306. Equally important, *only* LDCs have these obligations; neither independent marketers nor IPCs, such as Columbia, share these burdens.

Ohio law requires LDCs to meet several obligations, all of which ensure that consumers' natural gas needs are met.[1] Specifically, LDCs must do all of the following:

- Serve all members of the public and ensure access to natural gas for residential, commercial, and industrial consumers alike without discrimination, Ohio Rev. Code §§ 4905.03, 4905.06, 4905.35, Pet. App. at 26a, ¶ 69; *Tracy*, 519 U.S. at 297;

- Guarantee a supply of natural gas for all consumers at all times—and to do so, LDCs must commit to costly long-term purchase and storage contracts at "just and reasonable rates," for which they may not earn a rate of return on the gas they purchase, but, instead, may recover

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[1] Ohio's tax and public utility laws refer to these companies as "natural gas companies," but the term LDC is commonly used in the natural gas industry, and the Court used the term LDC in *Tracy* to refer to these entities. See Ohio Rev. Code §§ 5727.01(D)(4) and 4905.03(A)(6); *Tracy*, 519 U.S. at 282.

only the reasonable purchase costs, Ohio Rev. Code §§ 4905.22, 4905.302; Ohio Adm. Code Chapter 4901:1-14;[2] Pet. App. at 26a, ¶¶ 68-69; *Tracy*, 519 U.S. at 297;

- Protect all Ohio natural gas consumers by acting as default providers, or "providers of last resort," when an alternative supplier fails to provide service, Ohio Rev. Code § 4905.302(C)(2), Ohio Adm. Code 4901:1-27-12(G), (H), and (J); Pet. App. at 26a, ¶ 69; *Tracy*, 519 U.S. at 297;

- Follow certain administrative procedures before terminating services and avoid terminating service for non-payment in winter to low-income, elderly, and handicapped residential customers, Ohio Rev. Code §§ 4933.12, 4933.122; Pet. App. at 26a, ¶ 69; *Tracy*, 519 U.S. at 297;

- Abide by reporting and other stringent requirements on the conduct of their business, Ohio Rev. Code §§ 4905.14, 4905.40, 4905.41, 4905.48, 4935.04; Pet. App. at 26a, ¶ 69; *Tracy*, 519 U.S. at 297.

All of these duties, again, are *unique* to LDCs, and the new system of residential-market competition between LDCs and independent

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[2] See, e.g., *Vectren Energy Delivery of Ohio, Inc. v. PUCO*, 863 N.E. 2d 599 (2007) (applying the "gas cost recovery process" established under Ohio Adm. Code Chapter 4901:1-14).

marketers does not change that fact. True, as Columbia notes, Ohio now allows independent natural gas marketers to compete with LDCs in the retail sale of natural gas to residential and business consumers. See Ohio Rev. Code § 4929.01 *et seq.* But while Columbia seems to suggest that these largely unregulated marketers do so on equal footing with the LDCs, that is simply not the case. The marketers may compete to sell gas to residents, but they do not carry LDCs' obligations. That is so because, unlike LDCs, Ohio's natural gas marketers, whether independent from or affiliated with an LDC, are not "public utilities" under Ohio's regulatory law. Ohio Rev. Code § 4929.01(G) and (N) (excluding natural gas marketers from the definition of "natural gas company"); Ohio Rev. Code § 4929.03 (exempting all but "natural gas compan[ies']" activities from jurisdiction of Public Utilities Commission of Ohio ("PUCO")).

Not only are independent marketers not subject to the regulatory burdens, and attendant costs, of serving as the provider of last resort, but equally important, independent marketers are free of the strict economic limitations that PUCO imposes on LDCs. Those rules bar LDCs from making any profit on their natural gas sales. Independent marketers, by contrast, are free to earn a rate of return on their gas sales at whatever the market will bear. Ohio Rev. Code § 4929.02(A); *Chrysler Corp. v. Tracy*, 73 652 N.E. 2d 185, 186 (1995) (citing *In re Application of Yankee Res. Resources, Inc.* (Sept. 9, 1982), PUCO No. 82-1086-GA-ARJ, unreported). That alone would justify differential tax treatment.

In addition, the LDCs and independent marketers do not sell the same product, as independent marketers sell only gas as a commodity, while the LDCs sell the bundled product of gas along with delivery of that gas. That is, marketers do not sell delivery-to-end-user transportation services; rather, they contract with residential and business consumers to sell natural gas that the marketers have purchased from others or produced themselves. Pet. App. at 27a, ¶ 71. LDCs still perform the delivery function for all of the marketers' residential customers and all but a few of the marketers' large industrial and commercial customers that have their own pipeline distribution systems. *Id.* Because the marketers sell only the gas itself, while the LDCs sell a bundled product of the gas itself along with delivery, the competition between marketers and LDCs is only partial.

Thus, even if *Tracy* turned primarily on the LDCs' monopoly status (and it did not), that status continues, as LDCs retain their monopoly over delivery to residential consumers. That is, even when independent marketers sell the gas to residents, the marketers need the LDCs to deliver the gas, because only the LDCs have the infrastructure of pipes leading into homes. And again, the LDCs' retained monopoly on delivery also means that only LDCs can sell the bundled product of gas *and* delivery.

Finally, even if one accepts the (mistaken) premise that LDCs and independent marketers are similarly situated, that does not help Columbia Transmission, which is an IPC, not a marketer. At most, Columbia's argument would support an anti-

discrimination mandate as between LDCs and marketers. And notably, although not at issue here, Ohio did assess marketers' personal property, for the tax and tax year at issue here, at the same level—namely, on 25 percent of the property's assessed value—that applied to LDCs' property. See former Ohio Rev. Code § 5711.22 (Page's 2001). That is, LDCs and marketers were treated the same (at least regarding the tax and years at issue), while IPCs such as Columbia have been the odd man out. And, as explained below, IPCs differ from both LDCs and independent marketers so greatly that equating IPCs and LDCs as "similarly situated" is not plausible.

b. IPCs cannot enter the LDCs' core market, and any marginal competition in minor markets is irrelevant.

As noted above, Columbia Transmission is not an independent marketer, so it is not one of the entities that now competes with LDCs in the residential market. In stark contrast, Columbia Transmission is an IPC, an interstate pipeline company, and for reasons both legal and practical, it cannot enter the LDC market. That, in turn, means that it is not similarly situated to LDCs in the market that matters under *Tracy*.

Columbia Transmission, as an IPC (or "pipe-line company" under Ohio law) is primarily in the business of transportation or "transmission" of natural gas. That includes the tasks of gathering gas and collecting it at production areas, transporting it across the country or States as needed, and then transferring the gas to local

distribution pipeline facilities, such as those owned and operated by Columbia's LDC affiliate, Columbia Gas of Ohio. In turn, Columbia Gas of Ohio and other LDCs then deliver the gas to end-user customers. But Columbia does not, and cannot, sell gas to residences as LDCs do. Several legal and factual issues keep the IPCs from being similarly situated to LDCs.

First, federal regulations, as promulgated by the Federal Energy Regulatory Commission ("FERC"), prevent IPCs from making retail sales to consumers. In fact, even delivery to end-users is limited, as FERC allows an IPC to engage only "incidentally" in limited end-user delivery services. And when it does do so, FERC Order No. 636 prohibits it from selling that gas; it may only deliver gas owned by others. That is, "FERC's Order No. 636 . . . required all interstate pipelines to 'unbundle' their transportation services from their own natural gas sales." *Tracy,* 519 U.S. at 284 (citing FERC Order 636, 57 Fed. Reg. 13267). In other words, "bundled" service is prohibited; Columbia Transmission may not sell the bundled product of the gas and its delivery. Such bundled sales exist only in the LDC market: residents buy from LDCs to obtain the package deal (along with the regulatory protection outlined above).

Second, the facts here reflect these legal limits. As the Ohio Supreme Court concluded below, any use by Columbia of its various pipeline property for delivery to end-user customers is purely "incidental" and "minimal" relative to the use of that pipeline in Columbia's transmission business. Pet. App. 10a-12a, ¶¶ 26-32. Columbia Transmission has never

used its Ohio-located pipeline property to deliver natural gas to purely residential consumers. The closest that Columbia comes to having residential customers, or arguably quasi-residential customers, are Columbia's "farm tap" customers. Those are agricultural concerns that, like industrial or commercial users, directly "tap into" Columbia's interstate lines, bypassing LDCs for delivery. As the Ohio Supreme Court explained, Columbia's service to these farms seems more a courtesy than a business, for, although Columbia has over 32,000 such customers, it earned "minimal" revenue from them. Pet. App. 11a, ¶¶ 29-30. In fact, Columbia Transmission's publicly filed reports show that it claimed no revenue in tax years 2000 and 2001 from natural gas *distribution*; all of its revenue was attributed to gas *transmission*. *Id.*

Moreover, Columbia Transmission's own experts explained that Columbia could not provide delivery service to residential customers, even if it wanted to. Columbia Transmission's pipelines are not physically configured, without further modifications, to enable such residential delivery services. *Id.* And just as its income reports attribute its revenue to transmission, not distribution, so, too, Columbia Transmission's annual FERC reports and Ohio public utility tax reports classify its property—namely, all of its various pipelines and related transportation equipment—as "transmission property." Essentially, Columbia acknowledges that its property is used for transmission purposes.

Thus, because IPCs such as Columbia Transmission cannot—as a legal or practical matter—enter the LDCs' core market, it is hard to

see how IPCs are now "similarly situated" to LDCs as to the relevant market.

Third, in light of Columbia Transmission's inability to enter the LDCs' core market of residential sales and delivery, the possibility, or even reality, of minor competition in other markets is simply irrelevant. Columbia insists that it and other IPCs may compete in other areas with LDCs—in gas storage, gas gathering, and gas transmission services. This focus on minor areas flies in the face of the Court's focus in *Tracy* on the key residential market, despite the fact that, as the Court plainly explained in *Tracy,* competition did occur in other markets. *Tracy,* 519 U.S. at 302-303. Columbia's way around *Tracy* on this point is circular: Columbia says that the Court should no longer focus on the core market because circumstances have changed; yet, as evidence of the change that purportedly justifies a new approach, it then points to competition in tangential markets, which would only be considered if the Court *first* reconsidered *Tracy's* analysis.

In addition, Columbia's factual assertions about competition in other markets, even if relevant, are not supported by the evidentiary record. As the Ohio Supreme Court concluded, the evidence "does not show that inter-state pipe-line companies are competing with LDC's for the same transportation-service customers." Pet. App. 24a-25a, ¶ 65. Similarly, the court concluded that "there is no evidence here that any interstate-pipeline companies owned or operated natural gas gathering or production facilities in Ohio during the tax years in question." *Id.* at 32a, ¶ 84. Finally, Columbia did

not show, in record evidence, that it directly competes with LDCs in any other market, even on a purely incidental basis.

Fourth and finally, Columbia—unable to show that it could enter the LDCs' core market or that it competes in a relevant way with LDCs in other markets—alternatively tries to shift the focus away from competition issues by stressing the common nature of the property that the various entities own. But this point, even if true, is irrelevant.

Columbia underscores this point in its Question Presented, referring to the fact that it and LDCs use "functionally identical equipment" in their respective businesses. But the Court has never compared businesses based on *what* equipment two entities use, as opposed to *how* they use it. If Columbia's view were true, an unregulated apple-delivery business would be similarly situated to a heavily regulated orange-delivery business, despite selling different products to different consumers, simply because both businesses used trucks and crates to deliver their wares. Cf. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125-26 (1978) (contrasting, in Commerce Clause context, the interstate business of integrated oil companies with local independent gasoline dealers, despite similarity of equipment in both types of businesses).

In sum, Columbia Transmission, as an IPC, is not similarly situated to LDCs. It cannot enter the LDCs' market, it does not compete significantly in other markets, and its use of similar property is irrelevant.

B. The lower courts are not divided on applying *Tracy*.

Columbia barely asserts a division in the lower courts, as it alleges only that the Ohio Supreme Court's decision below conflicts with a Kansas Supreme Court decision. See Pet. at 21-22 (citing and discussing *In re CIG Field Servs. Co.*, 112 P.3d 138 (2005)). But even that minor "conflict" is an illusion, because *CIG* is distinct from the decision below in several ways.

In *CIG*, the court addressed a Kansas property tax scheme that treated intracounty (intrastate) gas-gathering-system property more favorably than interstate and intercounty gathering-system property. CIG Field Services Company ("CIG"), an interstate gathering system, challenged the differential property tax treatment on Commerce Clause discrimination grounds.

To resolve that issue, the court in *CIG* followed this Court's *Tracy* decision, starting with *Tracy*'s "threshold question" about the entities in question. Thus, in *CIG*, the court examined "whether the interstate and intercounty systems are *similarly situated* to intracounty systems." *Id.* at 146 (emphasis added) (citing *Tracy*, 519 U.S. at 299-300). The *CIG* court quoted *Tracy*'s statement that "'in the absence of *actual or prospective competition between supposedly favored and disfavored entities in a single market there can be no local preference.*'" *Id.* at 146.

The CIG court answered the "similarly situated" question by examining the particular facts about the intracounty and intercounty systems at issue, and it concluded that the two were similarly situated.

Nothing about that "different" outcome creates a conflict with the decision below, for the facts regarding the intracounty and intercounty systems were nothing like the facts concerning LDCs and IPCs in Ohio. In particular, the Ohio scenario here involves the different classifications of LDCs and IPCs, not a classification, as in *CIG*, that distinguishes between intrastate and interstate counterparts.

Moreover, the Kansas Supreme Court, applying its standard of appellate review, deferred to its factfinding agency, the Kansas Board of Tax Appeals ("BOTA"), in reaching its conclusion. That is, the court did not itself find that the entities at issue competed; rather, it decided that "substantial competent evidence" existed to support the BOTA's findings regarding competition. *Id.* at 870.

Thus, all that *CIG* demonstrates is that the *Tracy* test, when applied to different facts, can come out different ways. That unsurprising conclusion is the stuff of regular law, not conflict.

C. This case provides no clean opportunity to review the "similarly situated" issue because Columbia's case is fatally flawed on other grounds.

Finally, this case is not a good vehicle to address the threshold issue of whether IPCs are "similarly situated" to LDCs, because even if Columbia Transmission could overcome its threshold problems—and it cannot—it would falter on at least two alternate issues. First, it would fail to show discriminatory taxation, despite the difference in property tax rates of 25 versus 88 percent, because the LDCs, unlike IPCs, must pay a separate "MCF tax." Thus, the IPCs' higher property tax rate is a "compensatory tax," imposed to bring the IPCs' total burden into rough equity with LDCs' burden. Second, Congress has expressly insulated Ohio's scheme here from dormant Commerce Clause challenge.

1. The challenged property tax statute is a constitutionally valid "compensatory tax" because it imposes on IPCs a burden "similar to" or "in lieu of" the tax burden that LDCs bear.

Under the "compensatory tax" doctrine, the Court has held that, even if a challenged tax statute operates to discriminate against interstate commerce, the tax nonetheless may constitute a constitutionally valid "compensatory" or "complementary" tax. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 n.2 (1996). As the Court explained in *Fulton*:

> We use the terms "compensatory" tax and "complementary" tax as two ways of describing the same phenomenon: a tax on interstate commerce "complements" a tax on intrastate commerce to the extent that it "compensates" for the burden imposed on intrastate commerce *by imposing a similar burden on interstate commerce.* We have also described taxes on interstate commerce as being imposed *"in lieu" of taxes on intrastate commerce.*

Id. (emphasis added); see also *Tracy*, 519 U.S. at 308-09.

Here, the higher property tax rate that IPCs must pay is merely a compensatory tax, because it substitutes for a *different* tax that LDCs, but not IPCs, must pay: the MCF tax. "MCF" stands for "thousands of cubic feet," and the MCF tax is charged to LDCs based on the volume of gas that the LDCs sell and deliver. Ohio Rev. Code § 5727.811. Ohio's General Assembly plainly intended for the LDCs' reduced property tax rate to offset the burden of the MCF tax, as both steps occurred in the same legislation. See Am. S. B. 287 of the 123rd General Assembly, effective Dec. 21, 2000, 148 Ohio Laws 1156, 11550 (enacting the reduction in the assessment rate on LDC personal property), 11560 (enacting the MCF tax imposed against LDCs). That is, LDCs once were subject to the same 88 percent property tax rate that IPCs face. Then, Ohio's General Assembly simultaneously imposed the new MCF tax on LDCs and lowered their property tax rate from 88 percent to 25 percent. Legislative

materials describe this combination as revenue-neutral from the State's collections perspective.[3] Of course, if the State expected to receive the same amount, it necessarily follows that the taxpayers were expected to pay the same, in aggregate.

Thus, Ohio's higher tax rate on IPCs is a compensatory tax under *Fulton* because it imposes a "similar burden" to the one that the MCF imposes on LDCs. Notably, the Court has applied two different standards for assessing possible compensatory taxes, and here, *Fulton*'s "similar burden" standard applies. That standard applies when a challenger alleges that a particular tax discriminates in practical effect, but not on its face. Here, Columbia raises only a challenge to the Ohio tax law's effect; it does not assert (nor could it) that the Ohio law facially discriminates against interstate commerce. Thus, the similar burden test applies, and for the reasons above, the challenged tax here is valid as a compensatory tax relative to the MCF tax.

By contrast, the Court uses a heightened standard to assess purported compensatory taxes in facial discrimination cases, but that standard does not apply here. When a challenged law allegedly discriminates on its face, the Court finds a tax compensatory only when it is "substantially

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[3] In the Ohio Tax Commissioner's Annual Reports for the 2002 tax year and for each year thereafter, the Tax Commissioner describes the MCF tax as having "replaced the revenue local governments lost when the assessment rate for natural gas distribution companies' [LDCs'] personal property was reduced from 88% to 25%." See 2002 Annual Report, Appendix to Commissioner Levin's Appellant's Brief, filed in Ohio Supreme Court, at 70.

equivalent" to the tax on intrastate commerce. *Fulton*, 516 U.S. at 332-333 (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 643 (1984)). But Ohio need not meet that test, as again, Columbia does not raise a facial discrimination claim.

In sum, under the "compensatory tax" doctrine, Ohio's tax scheme is constitutional, so even if Columbia could somehow succeed on its threshold issue, it ultimately cannot win this case. That, in turn, makes this a poor vehicle to review the threshold issue. If the Court ever finds a need to review the "similarly situated" test outlined in *Tracy*, it should do so in a case in which the resulting discrimination, and thus the ultimate result, at least *might* favor the party challenging a law. Here, by contrast, the facts regarding the MCF tax are strong enough to make Columbia's ultimate failure a foregone conclusion, and that is reason enough to deny review.

2. Federal law expressly exempts preferential State tax treatment of LDCs from dormant Commerce Clause challenge.

Yet another independent issue dooms Columbia's case. The negative Commerce Clause operates to restrict State action when Congress is silent. But when Congress expressly blesses State action, no such dormant Commerce Clause claim can succeed. That is the case here because Congress, in Section 1(b) of the Natural Gas Act of 1938, 15 U.S.C. 717(b), provides an "express Commerce Clause exemption for state regulation of retail natural gas sales." *Tracy*, 519 U.S. at 305; see also *id.* at 291 (Section 1(b) of the NGA "explicitly

exempted 'local distribution of natural gas' from federal regulation.").

To be sure, the Court in *Tracy* did not rely on the NGA's Commerce Clause exemption as an independent basis for sustaining the constitutionality of Ohio's sales and use tax classifications. But the Court's explanation, even if dicta, strongly suggests that the issue is not a close one, as the States' side is clear-cut:

> In the present case, the parties have not briefed the question whether the present amended version of the NGA and related federal legislation continues the express Commerce Clause exemption for state regulation and taxation of retail natural gas sales recognized in [*Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507 (1947)], and we do not decide this issue. We note, however, that the language of § 1(b) of the NGA, which the *Panhandle-Indiana* Court construed as creating the exemption, itself remains unchanged. (Compare 52 Stat. 821 with 15 U.S.C. § 717(b) (1994).)

Tracy, 519 U.S. at 305 n. 13; see also *id.* at 292-93 (citing *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946) (upholding discriminatory state taxation of out-of-state insurance companies as authorized by the McCarran Act)).

The *Tracy* Court's comments about the NGA's Section 1(b) apply today, as the same language that

remained unchanged at that time is still in the statute. Compare 52 Stat. 821 with 15 U.S.C. § 717(b) (2008).

Similarly, Congress surely is aware that the fundamental role played by LDCs in the natural gas industry remains unchanged from this Court's decision in *Tracy*. Although Ohio and other States may allow independent marketers to sell to consumers, the LDCs retain a unique role as the sole method of delivery to houses, and both the facts and the legal regimes reflect that. As natural monopolies, LDCs alone have the physical infrastructure of distribution pipeline to deliver natural gas to residential and small-business consumers. Thus, only the LDCs have the duty and ability to provide vital "bundled" natural gas to the general public as "providers of last resort" on the coldest days of the year.

If Congress sees the playing field as now "tilted" unfairly, as Columbia Gas argues, then Congress can step in to change the rules of the game. Unless it does, this Court has no need to change its course from *Tracy*.

In sum, Columbia Transmission's petition should be denied.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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